1976

# Packaging Corporation of America v. William W. Morris : Brief of Respondent

Utah Supreme Court


Lauren N. Beasley; Cotro-Manes, Warr, Fankhauser and Beasley; Attorney for Plaintiff.
Paul T. Moxley; Johnson and Spackman; Attorneys for Defendant.

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PACKAGING CORPORATION OF AMERICA, )
Plaintiff and Respondent, )
vs ) Case No. 14517
WILLIAM W. MORRIS, )
Defendant and Appellant. )

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# BRIEF OF RESPONDENT

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Appeal from the District Court of Salt Lake County,
State of Utah, the Honorable Stewart M. Hanson, Sr. Presiding

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LAUREN N. BEASLEY

Suite 430 Judge Building
Salt Lake City, Utah 84111

Attorneys for Respondent

Paul T. Moxley
JOHNSON & SPACKMAN
1320 Continental Bank Building
Salt Lake City, Utah 84101

Attorney for Appellant

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Salt Lake City, Utah 84101

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## STATEMENT OF THE NATURE OF THE CASE

This is an action to recover on a personal guaranty executed by the Appellant, William E. Morris, in favor of Packaging Corporation of America, Respondent.

## DISPOSITION IN LOWER COURT

This matter was tried to the Court, the Honorable Stewart M. Hanson, Sr. presiding. Plaintiff-Respondent was awarded judgment against the Defendant-Appellant in the sum of $20,000.00 together with court costs of $28.00 and attorney's fees of $2,000.00. From that adverse judgment the Defendant-Appellant has appealed.

## RELIEF SOUGHT ON APPEAL

Plaintiff-Respondent seeks to have the judgment of the District Court affirmed in its entirety.

## STATEMENT OF FACTS

Respondent Packaging Corporation of America is a corporation which operates two plants in Salt Lake City, Utah (R. 92, l. 27-30). Respondent had for many years supplied packaging material for Bakker's Royal Dutch Cookies located in Draper, Utah. Bakker's Royal Dutch Cookies became financially depressed and a court appointed receiver took over their assets and the operation of the business. Hawkeye Investment, by and through one of its largest stockholders, William Morris, (R. 138, l. 9 and R. 164, l. 10-11) made an application to the court appointed receiver in the State of Utah for the purchase of the assets of Bakker's Royal Dutch Cookies (R. 91, l. 19-25). Hawkeye Investment thereafter contacted Respondent in an attempt to establish a line of credit so it could continue to purchase cookie cartons for its products. The business was new and it was not financially able to pay for the products, so Respondent required that all shipments be shipped C.O.D. (R. 128, l. 3).

Appellant further informed Al Ellison, credit manager of Respondent, that he would be in Utah and would "oversee the operation and get reports from the local people on how things were progressing" (R. 145, l. 23).

Appellant William Morris and one William Birkinshaw, the president of Hawkeye Investment, approached the credit manager of Respondent in an attempt to establish an open account with

Respondent (R. 167, l. 2-8). It was agreed between the parties that credit would be extended to Hawkeye Investment if Mr. Morris and Mr. Birkinshaw would personally sign a guaranty in the sum of $10,000.00. This was done and the credit was then extended (R. 66, l. 23-28).

Within a short period of time it became apparent to the persons who were operating the cookie factory in Draper and the agents and employees of Respondent that a $10,000.00 guaranty was not sufficient (R. 95). Thereafter respondent, by and through James Remley, area credit manager, contacted Mr. Morris to see if he would be willing to execute a new personal guaranty in the sum of $20,000.00 (R. 99 and R. 110, l. 3-13). After some discussion Appellant agreed to execute a guaranty and it was forwarded by Mr. Remley to the Appellant, who signed the same, giving it to his agent, Milt Gordon, for transportation to Respondent's plant in Salt Lake City, Utah (R. 169, l. 15-16).

At no time did Mr. Morris communicate to Respondent that there were any conditions attached to his personal guaranty, such as the signature of Mr. Birkinshaw being necessary (R. 169, l. 22-25).

During the years 1971 (R. 132, l. 25-30 and R. 133, l. 1-12) and 1972 (R. 167, l. 12-13) Mr. Morris would come to the State of Utah on business connected with Hawkeye Investment d/b/a Bakker's Royal Dutch Cookies on the average of twice a year. Mr. Milt Gordon was Mr. Morris's agent within the State of Utah and was looking out for Morris Morris's investment in Hawkeye Investment

(R. 147, l. 23-29, R. 154, l. 17 and R. 168, l.14-30). In addition he would call Mr. Gordon in Salt Lake City at least once a week (R. 167, l. 17-18, R. 169, l. 1-10). These calls concerned the business with which Respondent was dealing in supplying the cookie packages (R. 169, l. 1-2). This is the same business, to wit: Hawkeye Investment d/b/a Bakker's Royal Dutch Cookies, which failed to pay the amounts due and owing to Respondent, causing Respondent to institute this action on Appellant's personal guaranty.

## ARGUMENT

### POINT I

THE LOWER COURT CORRECTLY RULED THAT THE APPELLANT HAD SUBMITTED HIMSELF TO THE JURISDICTION OF THE COURTS OF THE STATE OF UTAH.

Immediately after plaintiff commenced this action, defendant made a motion to dismiss plaintiff's complaint on the basis of lack of jurisdiction. In support of this motion the appellant submitted the affidavit of William W. Morris (R. 11) and the respondent submitted the affidavits of Al Ellison (R. 12) and Raymond E. Casaday (R. 17). A hearing was held before the Honorable Gordon R. Hall, Judge of the Third Judicial District Court, on or about the 8th day of October, 1974. At that time the court denied defendant's motion to dismiss (R. 22). Thereafter, at the time of trial, the appellant renewed their motion to dismiss for lack of jurisdiction (R. 162). The Third Judicial

District Court, by and through the Honorable Stewart M. Hanson Sr., declined to entertain the motion in light of recent decisions of this Honorable Court which have held to the effect that where one District Judge has entered an order another District Judge is not in a position to vacate such order. Petersen v. Petersen (1974) 530 P.2d 821; In Re Estate of Mecham (1975) 537 P.2d 312.

Judge Hanson took the entire matter of the trial under advisement, and on the 16th day of October, 1975, rendered a Memorandum Decision (R. 52-53). The Judge stated:

> "Another division of this court has already passed upon the question of whether or not there was sufficient minimal contact in Utah to give the plaintiff jurisdiction under the long-arm statute and found that this court did have jurisdiction, and it would appear from the evidence which developed during the trial that there was sufficient minimal contact to confer jurisdiction upon this court under the long-arm statute." (Emphasis added)

The Appellant, William Morris, came to the State of Utah as a large stockholder of Hawkeye Investment Company and acquired for Hawkeye Investment Company the assets of Bakker's Royal Dutch Cookies. This was an operating business located in Draper, Utah. The company then became known as Hawkeye Investment d/b/a Bakker's Royal Dutch Cookies. It transacted business with Respondent, Packaging Corporation of America, all of which business was transacted within the State of Utah.

This writer would submit that Appellant has not claimed that any of the business was transacted any place but in the

State of Utah. This business was between Hawkeye and Packaging Corporation of America. No claim could be made that if Respondent was suing Hawkeye Investment, a Nevada corporation, that the courts of the State of Utah would not have jurisdiction over Hawkeye because Hawkeye would have fulfilled every one of the criteria set forth in Hill v. Zale Corporation (1971) 25 U.2d 357, 482 P.2d 332, where the court, at page 334, said as follows:

> "1. Whether there are local offices, stores or outlets;
>
> 2. The presence of personnel, how hired, fired and paid; the degree of control and the nature of their duties;
>
> 3. The manner of holding out to the public by way of advertising, telephone listings, catalogs, etc.;
>
> 4. The presence of its property, real or personal, or interest therein, including inventories, bank accounts, etc.;
>
> 5. Whether the activities are sporadic or transitory as compared to continuous and systematic;
>
> 6. The extent to which the alleged facts of the asserted claim arose from activities within the state;
>
> 7. The relative hardship or convenience to the parties in being required to litigate the controversy in the state or elsewhere."

What we have in this case is a situation where the principal stockholder in a business which is clearly operating within the State of Utah and is doing business with persons and other businesses within the State of Utah, comes in the State

during this period of time on at least four occasions to see how his business is proceeding, he calls his agent, Milt Gordon, within the State of Utah once a week for two years to see how his business is progressing, and induces Respondent to do business with his business by giving his personal guaranty.

Clearly, all statutory, constitutional and case law requirements have been met with regards to the actions of the Appellant within the State of Utah. See: 78-27-24 Utah Code Annotated, 1953 (as amended, L. 1969, Ch 246 §3); International Shoe Co. v. Washington, 326 U.S. 310, 66 S.Ct 154, 90 L.ed 95; and Foreign Study League v. Holland American Line, 27 U.2d 442, 497 P.2d 244 (1972).

The only way Appellant can prevail on his claim of lack of jurisdiction is if this Court is prepared to say that the $20,000.00 guaranty must have been executed by the Appellant solely within the boundaries of the State of Utah.

In accepting Appellant's position, this Court would have to conclude that a person could come within the State of Utah and arrange numerous business transactions, all of which affect the people and businesses of Utah; he could have his business operate solely within the State of Utah, using his name as a business name; and that so long as the document which gave him ownership of the business was signed by him outside the State of Utah it would matter not that this business was daily making

purchases from other businesses within the State of Utah and not paying for them.

This, we submit, is clearly not what the Legislature intended when they enacted the jurisdiction over "Non-Residence Act" inasmuch as they specifically stated:

> ". . .that the public interest demands the state provide its citizens with an effective means of redress against nonresident persons, who through certain significant minimal contacts with this state, incur obligations to citizens entitled to the state's protection. . ." (78-27-22 Utah Code Annotated, 1953, as amended, L. 1969, Ch 246 §1)

It is further submitted by Respondent that it is not necessary under our Long-Arm Statutes for the Appellant to have personally been within the State of Utah each and every time any business was transacted. The testimony is clear from Mr. Morris's own statements (R. 168, l. 30-30) that Mr. Morris was doing business in the State of Utah through his agent, Milt Gordon.

Utah Code Annotated, 78-27-23 (2) reads as follows:

> "(2) The words 'transaction of business within this state' mean activities of a non-resident person, his agents, or representatives in this state which affect persons or businesses within the state of Utah." (Emphasis added)

This, we submit, is sufficient to sustain the findings of both Judge Hall and Judge Hanson, Sr. that Appellant was doing business within the state of Utah.

In his brief Appellant relies upon the following cases, which for the reasons hereinafter set forth are not applicable nor controlling in this matter:

(1) Mack Financial Corp. v. Nevada Motor Rentals, Inc. 529 P.2d 429. There is no claim made by respondent in this matter that the highway within the state of Utah were used by the appellant in order to obtain long-arm jurisdiction. The business transacted in that case was solely done in the state of Colorado, and the only contact with the state of Utah was when an officer from Nevada Motor Rentals, Inc. came to the state of Utah to request consent to assign the contracts to a business entity in Idaho. In the instant case we had Mr. Morris in the state of Utah at least twice a year in 1971 and 1972, plus he had his agent, Milt Gordon, within the state at most times and made calls to him at least once a week. In addition there were several times that Mr. Gordon was in the state of Utah and met and talked with employees and agents of Respondent.

(2) Transwestern General Agency v. Morgan, 526 P.2d 1186. This case clearly is not applicable in that the only business transacted in the state of Utah by defendant was the purchase of one policy of insurance, and this policy of insurance was initiated through an agent in the state of Idaho. For the reasons set forth in No. (1) above, this case is not applicable.

(3) Kocha v. Gibson Products Co. 535 P.2d 680. In this case there were uncontroverted facts that the Universal Carrier Co. did business principally in the state of Texas, had not been authorized to do business in the state of Utah, and did not sell any of its products to any business in the state of Utah. The court found that there were absolutely no facts upon which jurisdiction could be maintained. For the reasons set forth in No. (1) above, this case is inapplicable.

(4) Hydroswift Corp. v. Louie's Boats & Motors, Inc. 494 P.2d 532, 27 U.2d 233. This case was a tort case where the conversion took place in the state of Oregon, and the only contact within the state of Utah was the allegation of damages to plaintiff within the state of Utah and the fact that the purchase price was payable at Salt Lake City, Utah. This case clearly is not applicable in that it does not address itself to the question of the numerous contacts in the state of Utah which the record in this case showed.

(5) Conn v. Whitmore, 9 U.2d 250, 342 P.2d 871. This case is not applicable because we do not have the question of an out-of-state buyer taking the initiative. We have in this case an in-state supplier taking the initiative and the damage was done to a citizen within the state of Utah, to wit: Respondent, who is qualified to do business in the state of Utah and does in fact transaction business in the state of Utah and is entitled

to the protection of the Utah Courts.

In addition to the cases cited by Appellant in his brief on this point, there are some recent Utah Supreme Court decisions which should be distinguished at this point. The first one being the case of Cate Rental Co., Inc. v. Whalen & Co. 549 P.2d 707 (Utah, 1976) in which case the Court found that the defendant's president had been in Salt Lake City to discuss business dealings on only one occasion and that there had been perhaps five phone calls each year during which the parties had transacted business. In the instant case there were at least two times in each of the years the business was transacted between the parties that Appellant was within the state of Utah, he was constantly present in the state of Utah through his agent, Milt Gordon, and in addition made phone calls once a week for approximately two years. Secondly, Union Ski Co. v. Union Plastics Corp. 548 P.2d 1257 (Utah, 1976) wherein there were two times that the general manager of Union Plastics Corp. came within the state of Utah and had meetings. The rest of the negotiations with the parties and the consummation of the contract took place outside the state of Utah. This case is distinguishable because of the numerous telephone calls by appellant to check on his business within the state of Utah and his constant presence within the state of Utah by and through is agent, Milt Gordon. (78-27-23(2), Utah Code Annotated, 1953, as amended, L. 1969, Ch. 246, § 2).

It is respectfully submitted by Respondent that the presence of Appellant within the state of Utah during the time in question has been clearly demonstrated by the record. That the activities which gave rise to the claim against Appellant were continuous and systematic, and that they were activities which occurred within the state of Utah, to wit: the transaction of the cookie business, and thus it is more fair and logical that jurisdiction be found in this state.

It is further submitted by the Respondent that the Appellant has not shown in his brief the incorrectness of the rulings of the Third Judicial District Court. In the case of Union Ski Co. v. Union Plastics Corp. supra, at page 1259, this court said as follows:

> ". . .Second, on appeal we indulge the presumption of verity and correctness of the trial court's determination and do not distrub it unless the plaintiff has shown that it was in error."

It is thus incumbent upon the Appellant to not engage in generalities but to show specifically wherein the lower court erred.

## POINT II

THE GUARANTY WAS COMPLETE AND WAS ENFORCEABLE AGAINST APPELLANT.

It is a fortiori that whenever there is a vague, ambiguous

or unclear document, such document should be construed against the party who was responsible for the drafting of this document. General Appliance Corp. v. Haw, Inc., 30 U.2d 238, 516 P.2d 346 (1973).

However, a reading of the guaranty, which is the subject matter of this suit (R-3) clearly shows that this document is not ambiguous on its face. It would make no difference in this matter whether Mr. Birkinshaw had or had not signed the document. The document in its opening paragraphs reads, in part, as follows:

> ". . .and in consideration thereof, and of the benefits to accrue to each of us therefrom, each of us is a primary obligor severally and jointly and unconditionally guarantees to you. . ." (Emphasis added)

It is respectfully submitted that the document in question is not vague, ambiguous or uncertain by its terms.

Respondent has no argument with Appellant's statement that it is well settled law that a guaranty containing the conditional signature of one proposed guarantor subject to the additional signature of another party is not valid without the subsequent signature of the other parties. State Bank v. Burton Gardner, 14 U. 420, 48 P. 402 (1897)

The important matter which appellant has overlooked is that where conditions are made as between persons that one will not be bound unless the other has likewise signed the guaranty, this condition must be communicated to all of the parties involved.

In this particular case Mr. Morris, the Appellant, testified that he at no time communicated this condition to anyone at Packaging Corporation of America. His testimony is as follows:

> "Q Now, you have made some allegations to the effect that this guaranty is conditioned upon Mr. Birkinshaw signing it, as being jointly liable with you, is that correct?
>
> A That same condition is attached to the first $10,000.00 one.
>
> Q Now, did you ever communicate that condition to anyone who is an officer, agent, or employee of the Packaging Corporation of America?
>
> A Not to my knowledge.
>
> Q To whom did you communicate that condition?
>
> A To Mr. Birkinshaw and to Mr. Gordon." (R-169, l. 17-27)

It is well settled in the law that if you seek to have conditions placed upon your guaranty you must communicate these conditions to the creditor. Farmers & Stockgrowers' Bank v. Pahvant Valley Land Co., 50 U. 35, 165 P. 462 (1917);First National Bank in Grand Junction v. Osborne, 28 U.2d 387, 503 P.2d 440 (1972); Financial Corporation of America v. Prudential Carbon & Ribbon Co., 29 U.2d 238, 507 P.2d 1026 (1973); and State Bank of Utah v. Burton Gardner, supra, where at page 403 of 48 P. the Court approved the following part of the instruction:

> ". . .unless you find that the plaintiff had actual notice that the defendants who signed the guaranty signed it with the condition precedent to their liability thereon that all the directors should endorse on a note and sign the contract of guaranty; and also in the event of any director not signing that none of those who signed would be liable."

This position has been approved by this Court as aforesaid and by many of our sister states. J. L. Watkins Co. v. Brund, 294 P.2d 1024 (1931, Wash); Spencer Oil Co. v. Welborn, 20 N.C.App. 681, 212 S.E.2d 618 (1974); Northwestern Nat. Bank v. Foster, (Minn, 1936) 264 N.W. 570; Livestock Nat. Bank of South Omaha v. Marshall, (Neb, 1936) 267 N.W. 414; and McClintock v. Ayers, (Wyo, 1927) 253 P. 658

Respondent at no time relied on the signing of Mr. Birkinshaw. They were interested only in having Mr. Morris sign the guaranty before advancing additional credit (R-91).

POINT III

THE SUBJECT GUARANTY WAS SUPPORTED BY CONSIDERATION.

It appears from the evidence adduced at the time of trial that during the latter part of 1971 and the early part of 1972, Hawkeye Investment d/b/a Bakker's Royal Dutch Cookies had placed orders with Respondent that would have increased their indebtedness beyond the original guaranty signed by Appellant in the sum of $10,000.00, and in fact this indebtedness did exceed the $10,000.00 by virtue of several insufficient funds checks that were returned by the bank and which amounts were charged back to the account of Hawkeye Investment (Exhibits 7P, 8P and 9P; R-111, l. 9-21)

It was during this period of time that contract was made with the Appellant to increase his personal guaranty to

the $20,000.00 figure (R-95, l. 21-26). It took a period of approximately sixty days before Mr. Morris, the Appellant, had agreed to execute the new guaranty, and the guaranty was not delivered to the Respondent until February of 1972. According to the testimony and Exhibits 2P and 3P, orders had been placed during this period of time but had not been manufactured and shipped to Hawkeye Investment, which orders when manufactured and shipped were billed according to their order date, and thus it would appear that perhaps the amount owed to Respondent exceeded the $10,000.00. However, this is not the situation, because of the return checks and because of the orders that had not been processed and billed until a later date. The testimony of Mr. Remley and Mr. Ellison clearly show that upon the receipt of the orders from Hawkeye Investment, that appeared to exceed the $10,000.00 guaranty limit, they immediately started negotiations with Appellant in an attempt to get the $20,000.00 guaranty executed (R-146 and 147).

The case of Armstrong v. Cache Valley Land & Canal Co. 14 U. 450, 48 P. 690 (1897) appears to stand for the proposition that if the defendants receive no benefit from the guaranty then there was no consideration. However, in the instant case the Appellant was a large stockholder in Hawkeye Investment Company, he was concerned with the cookie plant operating and having the necessary packaging to market its products, and in order to

accomplish this it was necessary for Hawkeye Investment to acquire the packaging from the Respondent. This was understood and accepted by the Appellant before he executed the guaranty for $20,000.00. In his testimony (R-163, l. 18024) he said as follows:

> ". . .I am not sure whether it was a phone conversation, or several conversations, but it was on the basis that the $10,000.00 line of credit that Mr. Birkinshaw and I had previously guaranteed had been stood up, and in order to get anything over $10,000.00 we were going to have to execute another guaranty in the amount of $20,000.00."

The guaranty itself (R-3) recites consideration being received by the Appellant, and further states:

> ". . .and of benefits to accrue to each of us therefrom, . . ."

The guaranty on its face is a valid guaranty, it is an absolute guaranty and is fully enforceable against the Appellant. Brown v. Merit, 97 U. 65, 89 P.2d 478 (1939); and Hallstrom v. Buhlar, 14 U.2d 111, 378 P.2d 355 (1963).

Appellant would have this Court now believe that he received no benefit from the execution of the $20,000.00 guaranty. There is no testimony that he received no benefit, and in fact his own testimony as set forth hereinabove would lead this writer to conclude that he got exactly the benefit that he expected, to wit: that Packaging Corporation would only allow Hawkeye Investment's indebtedness to exceed $10,000.00 if he executed the $20,000.00 guaranty, which he did.

## CONCLUSION

It is respectfully submitted that the Trial Court properly concluded that the Appellant had submitted himself to the jurisdiction of the Utah courts by engaging in business within the State of Utah and by maintaing an agent in this State with whom he had weekly contact during the time period involving the transactions between Appellant and Respondent.

The Trial Court further correctly found valid consideration for the guaranty, and that the guaranty was clear and unambiguous and the alleged condition precedent attached to the guaranty by the Appellant was not properly communicated to the Respondent, and the Appellant is therefore bound by his guaranty and Respondent respectfully submits that this Court should affirm the judgment of the District Court.

Respectfully submitted,

LAUREN N. BEASLEY

Attorney for Respondent